Evergreen Frontier (M) Sdn Bhd v The Director of Lands and Surveys, Sabah & Anor

HIGH COURT (SANDAKAN) — SUIT NO S22–16 OF 1999
LINTON ALBERT JC
7 OCTOBER 2004

Land Law — State land — Alienation by State Authority — Withdrawal of offer to alienate land — Whether justified

Administrative Law — Exercise of administrative powers — Alienation of land — Withdrawal of offer to alienate land — Whether such discretion not within court's scrutiny

The second defendant had on 22 August 1997 offered to alienate land to the plaintiff. The plaintiff accepted the offer and duly complied with the condition of the offer by paying RM125,750 representing 50% of the premium payable. The second defendant did not proceed to alienate the said land to the plaintiff because the first defendant had, prior to the offer to alienate the said land to the plaintiff, issued the necessary papers called RSP to another group of 62 rival land applicants to survey the said land. Upon the refusal of the first defendant to accede to the plaintiff's demand to cancel the RSP issued to the 62 applicants, the plaintiff commenced proceedings against the first and second defendants for breach of the agreement to alienate the said land. Subsequently, a replacement piece of land was offered to the plaintiff which he duly accepted and expended a sum of RM15,965 as survey fee and the replacement land was duly surveyed and measured and the plan forwarded for approval. However, this deal did not materialize due to allegedly, non-compliance with governmental procedure. As a result, the plaintiff was asked to resubmit his land application. Dissatisfied, the plaintiff commenced this action for breach of agreement. Counsel for defendant submitted that s 9 of the Land Ordinance of Sabah (Cap 68) confers a discretion on the first defendant to alienate state land and the exercise of the discretion is, by virtue of s 41(1), not appealable. Hence, it is argued, the court has no jurisdiction over the withdrawal of the offer to alienate the replacement land to the plaintiff. The issue before the court was whether the defendants were correct in law to say that the said offer of amendment was issued under a mistake and as such should be retracted.

Held, allowing the plaintiff's claim for damages:

(1) The defendants have sent the plaintiff on a wild-goose chase for 22 years, in the course of which the plaintiff paid a substantial sum of money to the defendants or authorities related to them and not a cent has been refunded to the plaintiff. What the plaintiff went through constitutes an injustice (see para 9).

(2) The exercise of the first defendant's discretion, based as it was, on what was clearly a trumped up excuse cannot be exempted from judicial scrutiny. In any event, s 41(1) of the Land Ordinance of Sabah (Cap 68) does not preclude the court from exercising jurisdiction just because the plaintiff's claim relates to matters pertaining to the alienation of the replacement land by the first defendant. Here, the court is not concerned with the alienation of the replacement land by the first defendant which is prohibited by s41(1) of the Land Ordinance of Sabah, but rather the withdrawal or revocation of the offer to alienate, which clearly falls outside the ambit of s 41(1) (see para 11).

(3) The issuance of the said letter to the plaintiff and its unconditional acceptance by the plaintiff undoubtedly constitute a binding contract between the plaintiff and the second defendant. The fact that both parties agreed on the relevant issue implied admission of the existence of a binding contract. The second defendant cannot wriggle out of the agreement to alienate the replacement land simply by issuing the withdrawal letter (see para 13).

[**Bahasa Malaysia summary**

Defendan kedua telah pada 22 Ogos 1997 membuat tawaran untuk memberi milik tanah kepada plaintif. Plaintif telah menerima tawaran tersebut dan mematuhi syarat tawaran dengan membayar RM125,750 yang mewakili 50% daripada premium yang perlu dibayar. Defendan kedua tidak meneruskan dengan pemberian milik tanah tersebut kepada plaintif kerana defendan pertama telah, sebelum tawaran pemberian milik tanah tersebut kepada plaintif, mengeluarkan suratcara yang dikenali sebagai RSP kepada sekumpulan 62 orang pesaing lain yang memohon tanah tersebut untuk menilai tanah tersebut. Setelah defendan pertama enggan bersetuju dengan tuntutan plaintif agar membatalkan RSP yang dikeluarkan kepada 62 pemohon itu, plaintif telah memulakan prosiding terhadap defendan-defendan pertama dan kedua kerana melanggar perjanjian untuk memberi milik tanah tersebut. Berikutan itu, sebagai ganti sebidang tanah telah ditawarkan kepada plaintif yang telah diterima oleh beliau dan membayar sejumlah RM15,965 sebagai yuran penilaian dan tanah gantian tersebut telah dinilai dan diukur dan pelan telah dikemukakan untuk kelulusan. Bagaimanapun, urusan ini tidak berjaya diselesaikan kerana dikatakan tidak mematuhi prosedur kerajaan. Akibatnya, plaintif telah diminta untuk menghantar balik permohonan tanah beliau. Berasa tidak puas hati, plaintif telah memulakan tindakan ini kerana perlanggaran perjanjian.

Peguam untuk defendan berhujah bahawa s 9 Ordinan Tanah Sabah (Bab 68) memberikan budi bicara kepada defendan pertama untuk memberi milik tanah kerajaan dan penggunaan budi bicara ini, menurut s 41(1), tidak boleh dirayu. Justeru itu, ia dihujahkan, mahkamah tidak mempunyai bidang kuasa ke atas

penarikan balik tawaran untuk memberi milik tanah gantian kepada plaintif itu. Persoalan yang dihadapkan ke mahkamah adalah sama ada defendan-defendan betul dari segi undang-undang untuk mengatakan yang tawaran pindaan tersebut telah silap dikeluarkan dan patut ditarik balik.

Diputuskan, membenarkan tuntutan ganti rugi plaintif:

(1) Defendan-defendan telah membuang masa plaintif selama 22 tahun, dimana dalam tempoh ini plaintif telah membayar sejumlah besar wang kepada defendan-defendan atau pihak berkuasa berkaitan dengannya dan tidak sesen pun yang dikembalikan kepada plaintif. Apa yang dilalui oleh plaintif merupakan satu ketidakadilan yang nyata (lihat perenggan 9).

(2) Penggunaan budi bicara defendan pertama, berdasarkan satu alasan yang nyata dibuat-buat tidak boleh dikecualikan daripada penelitian kehakiman. Dalam apa keadaanpun, s 41(1) Ordinan Tanah Sabah (Bab 68) tidak menghalang mahkamah daripada menggunakan bidang kuasa hanya kerana tuntutuan plaintif berkaitan dengan perkara-perkara mengenai pemberian milik tanah gantian oleh defendan pertama. Di sini, mahkamah tidak mementingkan pemberian milik tanah gantian oleh defendan pertama yang dihalang oleh s 41(1) Ordinan Tanah Sabah, tetapi mengambil berat tentang penarikan balik atau pembatalan tawaran pemberian milik yang jelas di luar ruang lingkup s 41(1) (lihat perenggan 11).

(3) Pengeluaran surat kepada plaintif dan penerimaan tidak bersyarat oleh plaintif secara langsung membentuk kontrak yang mengikat plaintif dan defendan kedua. Hakikat bahawa kedua-dua pihak bersetuju tentang isu berkaitan secara tersirat menerima kewujudan kontrak yang mengikat. Defendan kedua tidak boleh melepaskan diri daripada perjanjian untuk memberi milik tanah gantian ini hanya dengan mengemukakan surat penarikan balik (lihat perenggan 13).]

Notes

For cases on alienation by state authority, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) para 3868.

For cases on exercise of administrative powers, alienation of land, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) para 4.

Cases referred to

Burhan Ating v Director of Lands & Surveys & Ors [1992] 2 CLJ 1203 (distd)

Lim Fong Tsin & 23 Ors v Asst Collector of Land Revenue, & 2 Ors (Suit No S(22)–24 of 1996) (refd)

Sa-Mal (Sabah) Corp Sdn Bhd v Director of Lands & Surveys, Sabah [1994] 3 CLJ 229 (refd)

Legislation referred to

Government Proceedings Act 1956 s 29
Land Ordinance of Sabah s 9, 9(1), 41(1)

David Wong (Peter Lo & Co) for the plaintiff.
Halim Hanapia (State Attorney General's Chambers) for the defendants.

Linton Albert JC:

[1] The second defendant had on 22 August 1997 offered to alienate land to the plaintiff. The land offered was at Sungai Bangau-Bangau, Beluran comprising 503 acres more or less ('the said land') under Land Application PT 92082134. The plaintiff accepted the offer and duly complied with the condition of the offer by paying RM125,750.00 representing 50% of the premium payable. The second defendant did not proceed to alienate the said land to the plaintiff because the first defendant had, prior to the offer to alienate the said land to the plaintiff, issued the necessary papers called RSP to another group of 62 rival land applicants to survey the said land and upon the refusal of the first defendant to accede to the plaintiff's demand to cancel the RSP issued to the 62 applicants, the plaintiff commenced proceedings against the first and second defendants for breach of the agreement to alienate the said land.

[2] Subsequently, an amicable settlement appeared to have been reached when by a letter dated 9 November 2002 (the said letter) the first defendant, on behalf of the Government of the State of Sabah offered to amend the offer under PT 92082134 by replacing the said land and substituting it with land also at Sg Bangau-Bangau but in the District of Labuk/Sugut (the replacement land). The offer of amendment reflected in the said letter was promptly accepted by the plaintiff on 11 November 2002. Indeed, it was the plaintiff who initiated the process to bring about the amicable settlement and went through the whole rigmarole of identifying the replacement land which culminated in the issuance of the said letter, the importance of which to the determination of the present case, merits its reproduction:

Bil Tuan Tarikh: 9 November 2002

Bil Kami: LS 801.13366(vol 2)/10(aja)

Evergreen Frontier (M) Sdn Bhd
PPO Box 1374
Sandakan

OFFER OF AMENDMENT TO THE ACCEPTED OFFER LS 801 1,3366/107 DATED 22 AUGUST, 1997–PT92082134 ATSG BANGAU-BANGAU, DAERAH LABUK/SUGUT

On behalf of the Government of the State of Sabah, I hereby offer to amend the accepted offer via LS 801.1.3366/107 dated 22 August, 1997:

by the deletion of the sketch numbered LS 801.1.3366/106;

and substitution of the amended sketch numbered LS 801.1.3366(vol.2)/10A, shown herein as per attachment, with additional conditions to the SCHEDULE and all approved land applications before this amendment and the existence of anycustomary rights within the area should be excised from the survey of PT9208222134,

2 This offer is open and valid only until and shall lapse on 9 February 2003.

3 Please return a copy of this accepted Offer to the Director of Lands and Surveys signifying your acceptance by signing in the place provided.

4 Please return the accepted Offer to the Director of Lands and Surveys before 9 February 2003

KEARAH PENGURUSAN TANAH YANG SEJAHTERA
BERKHIDMAT UNTUK NEGARA DENGAN CEKAP,
BERSIH DAN AMANAH

Saya yang menurut perintah,

TT

(HJ DAHLAN BIN HJ AM TENGAH)
bp Pengarah Tanah dan Ukur

[3] Pursuant to the said letter the plaintiff expended a sum of RM15,965 as survey fee and the replacement land was duly surveyed and measured and the plan forwarded for approval. It turned out that the plaintiff was to encounter yet another disappointment because the alienation of the replacement land to the plaintiff like that of the said land was not to be. The offer contained in the said letter was capriciously withdrawn by the first defendant's letter dated 29May 2004 (the withdrawal letter) which is reproduced. It is as follows:

Bil Kami: LS 801.13366/vol II(101) DAHT/rk Tarikh: 29 Mei 2004

Evergreen Frontier (M) Sdn Bhd
PO Box 1316
90008 Sandakan (Fax : 089–272005)

Tuan

OFFER OF AMENDMENT TO THE ACCEPTED OFFER
LS 801.13366/107 DATED 22 AUGUST 1997:
PT 92082134 AT SG BANGAU–BANGAU, DAERAH LABUK/SUGUT

I am directed to refer to you in respect of the abovementioned offer which was issued under reference LS 801.1.3366(Vol 2)/10(aja) dated 9 November 2002.

2 It has been discovered lately that this Offer of Amendment to the accepted offer was issued NOT in pursuant to the provision of s 9(1) of the Land Ordinance, Cap 68 as it did not have the prior direction of the Cabinet. Therefore, it is reasonable to withdraw the said offer to enable you to formally apply the proposed replacement area in accordance with the normal alienation procedure.

3 In compliance with the above requirement, you are therefore advised to submit the formal land application to Penolong Pemungut Hasil Tanah, Beluran for the purpose of registration and processing in line with the normal procedural practice.

4 Therefore, you are kindly requested to return the original Offer of Amendment to the accepted offer under reference LS 801.13366(Vol 2)/10(aja) dated 9 November 2002 to this office immediately.

Thank you for your co-operation, please.

Saya yang menurut perintah,

TT

(Hj Dahalan Hj AH Tengah)
bp Pengarah Tanah dan Ukur

[4] The plaintiff accordingly amended its statement of claim to include an alternative cause of action engendered by the alleged breach of the agreement in the said letter and the defendants responded by amending their defence.

[5] There is no controversy as to the issue that has to be determined which is this:

Whether or not the defendants are correct in law to say that the said offer of amendment was issued under a mistake and as such should be retracted.

[6] In the circumstances, it is unnecessary to seriously consider the plaintiff's claim in respect of the defendants' refusal to proceed to alienate the said land because the sole issue agreed by the parties implies that the plaintiff's claim is confined to the withdrawal of the offer to alienate the replacement land to the plaintiff.

[7] The defendants' amended defence contains the following substantive pleas:

Para 11 …the offer of amendment issued to the plaintiff is an effort between parties to seek an amicable settlement The first and second defendants state that any alienation resulting from that effort must be done in accordance to the provisions of the Land Ordinance (Cap 68).

Para 13 s 41(2) of the Land Ordinance expressly states that the court has no jurisdiction to adjudicate any matter which falls under the jurisdiction of the director as provided under s 9 of the said Ordinance.

[8] There are other ancillary defences but are not seriously pursued. I shall begin by considering para 13 of the defendants' pleaded defence because if the defendants' contention is well-founded all other issues are rendered otiose. Learned counsel for the defendants, En Halim Hanapia, contends that s 9 of the Land Ordinance (Cap 68) confers a discretion on the first defendant to alienate state land and the exercise of the discretion is, by virtue of s 41(1), not appealable. Hence, it is argued, the court has no jurisdiction over the withdrawal of the offer to alienate the replacement land to the plaintiff. It will be useful to set out the relevant provisions of the Land Ordinance (Cap 68) relied on by learned counsel for the defendants. They are as follows:

Section 9:

(1) Subject to any general or special direction of the Minister the Director may alienate state land on such terms or in such manner as is authorized by this ordinance and may also impose special conditions in respect thereof to be set out in the title.

(2) In particular such conditions may specify the particular product or class of products which or which alone is to be cultivated, and may forbid the cultivation of any particular product or class of products.

Section 41(1):

An appeal shall lie from any order or decision of a collector, surveyor or registrar given under this ordinance to the director, and again from any order or decision of the director, whether original or an appeal, to the court: Provided that no appeal shall be admitted:

(a) after the expiration of thirty days from the date of the order or decision appealed against:

(b) until the prescribed fees shall have been paid;

(c) if it is expressly provided that the order or decision shall be final or if any other form of appeal is prescribed;

(d) from any decision of the director under s 9 of this ordinance.

[9] Learned counsel for the defendants relies on *Burhan Ating v Director of Lands & Surveys & Ors* [1992] 2 CLJ 1203. With respect I agree with the submission of learned counsel for the plaintiff, Mr David Wong that reliance on *Burhan Ating* is misplaced because the facts there are totally different from those in the present case. Here, there was an offer to alienate the replacement land which the plaintiff had accepted and pursuant to the offer, the replacement land had even been surveyed and measured and the plan forwarded for approval whereas in *Burhan Ating* the plaintiff there relied on letters of approval issued respectively by the 'Setiausaha Hasil Bumi' of the Chief Minister's Office and the Assistant Collector of Land Revenue of the Lands and Surveys Department, Tawau, neither of whom is empowered to alienate land under s 9 of the Land Ordinance of Sabah (Cap 68). Our courts, particularly in more recent times, do not countenance statutory provisions which purport to exclude judicial scrutiny of the exercise of discretion by public officers especially where the

discretion is exercised unreasonably or in utter disregard for accepted notions of justice and fairness. Here, the defendants have sent the plaintiff on a wild-goose chase for 22 years, in the course of which the plaintiff paid a substantial sum of money to the defendants or authorities related to them and not a sen has been refunded to the plaintiff. If what the plaintiff went through do not constitute an injustice, I do not know what will. It is useful to quote a passage from the judgment of Richard Malanjum J (as he then was) in *Lim Fong Tsin & 23 Ors v Asst Collector Of Land Revenue, Beluran & 2 Ors* (Suit No S(22) – 24 of 1996) (unreported):

> And s 9 of the Ordinance gives the director the discretion on the alienation of state land subject of course to any general or special direction of the Minister. To that extent I agree with the view expressed by Ian Chin J in the case of *Sa-Mal (Sabah) Corporation Sdn Bhd v Director of Lands and Surveys, Sabah* (OM No KA of 1992) (unreported). However I do not think the discretion given to the director therein should be construed as unfettered. 'Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not b exercised unreasonably. In other words, every discretion cannot be free from legal restraint: where it is wrongly exercised, it becomes the duty of the courts to intervene'. Gopal Sri Ram JCA in *Datuk Bandar Kuala Lumpur v Zain Azahari b Zainal Abidin* [1997] 2 AMR 1671 at p 1692.

[10] The defendants' plea under para 11 of the amended defence is also relevant to the question whether the court is precluded from determining the plaintiff's claim because it relates to the exercise of the first defendant's discretion to withdraw the offer to alienate the replacement land to the plaintiff. The withdrawal letter states that the offer contained in the said letter was not issued in accordance with s 9(1) of the Land Ordinance of Sabah (Cap 68) 'as it did not have the prior direction of the Cabinet,' a proposition that was completely and clearly debunked by the defendants' own witness, Mohamad b Jafry (DW1) the current Director of Lands and Surveys, Sabah whose relevant testimony merits reproduction:

> Paragraph 59 to 61 of the Notes of Proceedings:
>
> Q: So the plaintiff application does not need to be approved by the Cabinet.
>
> A: Yes.
>
> Q: Do you agree with me that what you said just now about approval by Cabinet does not tally with para 2 of p 22 of PBD.
>
> A: Yes
>
> Q: So you are correct and your Deputy Director is incorrect.
>
> A: Yes.

[11] Surely, the exercise of the first defendant's discretion, based as it was, on what was clearly a trumped up excuse cannot be exempted from judicial scrutiny. In any event, I do not hold the view that s 41(1) of the Land Ordinance

of Sabah (Cap 68) precludes the court from exercising jurisdiction just because the plaintiff's claim relates to matters pertaining to the alienation of the replacement land by the first defendant. Here, the court is concerned not with the alienation of the replacement land by the first defendant which is prohibited by s 41(1) of the Land Ordinance of Sabah, but rather the withdrawal or revocation of the offer to alienate, which clearly falls outside the ambit of Section 41(1). In *Sa-Mal (Sabah) Corp Sdn Bhd v Director of Lands & Surveys, Sabah* [1994] 3 CLJ 229, Ian Chin J, while deciding that the refusal of the respondent to issue the offer to alienate land is a decision within the meaning of s 9 of the Ordinance and thus the appeal against the decision was incompetent because of the prohibitions under s 41(1) of the Sabah land Ordinance, went on at p 237 to state as follows:

> It would have been a different matter if the appellant had already been issued the offer to alienate land and the respondent sought to revoke it

[12] For the reasons aforesaid I hold that the contention of learned counsel for the defendants that the court has no jurisdiction to hear the plaintiff's claim is unsustainable. I do not think there is any merit in the defendants' contention that the PT (Permohonan Tanah) number in the offer contained in the said letter makes it necessary for the first defendant to issue the withdrawal letter thereby requiring the plaintiff to repeat the whole rigmarole of making another application for the replacement land from scratch. It defies logic how such an innocuous administrative matter can conceivably be elevated to such great importance by the first defendant as to require the withdrawal of the offer to alienate the replacement land. Indeed, it clearly goes to show that the exercise of the first defendant's discretion to issue the withdrawal letter is totally unreasonable.

[13] The issuance of the said letter to the plaintiff and its unconditional acceptance by the plaintiff undoubtedly constitute a binding contract between the plaintiff and the second defendant. The fact that both parties agreed on the sole issue set out above incontrovertibly implies admission of the existence of a binding contract. The second defendant cannot, for the reasons I have stated earlier, wriggle out of the agreement to alienate the replacement land simply by issuing the withdrawal letter. I therefore hold that the plaintiff has successfully established its claim, which brings me to the final question of the reliefs sought by the plaintiff.

[14] I do not think it is either useful or appropriate to grant the declaratory and other orders requiring the defendants to proceed to go about issuing the document of title of the replacement land to the plaintiff, not so much because the plaintiff may yet again be sent on another wild-goose chase but because the orders would run foul of the Government Proceedings Act 1956. Although couched in language that does not appear to be inconsistent with the Government Proceedings Act 1956, the effect of these orders, if granted, would amount to

an order of specific performance against the government which is prohibited by s 29 of the Government Proceedings Act 1956. In the circumstances I allow the plaintiff's alternative claim in damages and accordingly make the following orders.

(1) That the defendants do pay to the plaintiff damages including damages for loss of opportunity and full cost of the plaintiff's expenses for breach of and reliance on the agreement under the said letter dated 9 November 2002 such damages to be assessed by the deputy registrar;

(2) Discretionary interest on the damages to be assessed at the rate of 8% per annum from the date of the writ of summons to the date of judgment and thereafter there shall be statutory interest at the rate of 8% per annum from date of judgment to the date of full payment; and

(3) Costs to the plaintiff to be taxed unless agreed. There is nothing before the court to justify the orders for punitive and exemplary damages and are therefore disallowed. Order accordingly.

Claim for damages allowed.

Reported by AG Kalidas